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NEW YORK CITY'S POTHOLE LAW: IN NEED OF REPAIR

I. Introduction

In 1979, New York City enacted Local Law Number 82¹ (Pothole Law) in an attempt to reduce the number of tort claims brought against the city for sidewalk and roadway defects. Although the statute was discussed in terms of creating a more effective program of street and roadway repair, the primary purpose of the law was to ease a significant financial burden² on the city budget.³ The statute is intended to address these policy considerations by requiring notice of defect before the city may be found liable.⁴ In doing so, however, the statute unnecessarily sacrifices established legal principles.

At common law, cities have a duty to keep their streets in a reasonably safe condition.⁵ If a municipality⁶ has actual or constructive

1. NEW YORK, N.Y., ADMIN. CODE ch. 16, tit. A, § 394a-1.0(d), as added by Local L. No. 82 of the City of New York for 1979, effective June 4, 1980. For the full text of the statute, see note 36 *infra*.

2. Office of the Comptroller of the City of New York, Analysis of New York City Sidewalk and Roadway Claims 14 (May 5, 1977) [hereinafter cited as Sidewalk and Roadway Analysis]. "Unless corrective measures are taken, we estimate that the City will pay out at least \$71.8 million in the next seven years as a result of these claims." *Id.* at 7. Other reasons for enacting the pothole law are discussed at notes 38-41 *infra* and accompanying text.

3. Sidewalk and Roadway Analysis, *supra* note 2, at 5. The Office of the Comptroller's analysis of sidewalk and roadway claims established that the city, in the fiscal years 1969-70 through 1975-76, paid \$61.2 million to sidewalk and roadway claimants. *Id.* at 3. In 1969-70, the average payment per claim was \$1,600 while in 1975-76 the amount increased to \$3,000. *Id.* at 5. The analysis also projected that the average payment per claim would increase \$200 each year so that a total of \$71.8 million would be paid out in the years 1976-77 through 1982-83. *Id.* at 8. At the public hearings before the City Council Committee on Governmental Operations in 1979, Comptroller Harrison Goldin testified that the figures rose even higher than originally projected for the years 1976-77 through 1978-79. He stated that the New York City prior written notice bill would save the city "at least \$10 million a year," which could be spent on reconstruction of the City's streets and sidewalks. *Testimony by Comptroller Harrison Goldin before the City Council Comm. on Governmental Operations*, City Hall, New York (August 6, 1979). Comptroller Goldin testified that in 1976-77, \$9,798,000 was paid to 3,187 claimants, in 1977-78, \$9,053,000 was paid to 3,600 claimants and in 1978-79, \$10,959,000 was paid to 4,965 claimants. *Id.* at 7. See note 51 *infra*.

4. Local L. No. 82, subdiv. 2. See note 36 *infra*.

5. 19 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 54.03b, at 13-14 (3d ed. 1967) [hereinafter cited as MCQUILLIN]; *Jones v. City of Columbus*, 134 F.2d 464, 465 (5th Cir. 1943); *Peters v. City and County of San Francisco*, 41 Cal. 2d 419, 424, 260 P.2d 55, 59 (1953); *Rox v. Village of Great Neck*, 25 Misc. 2d 848, 849, 214 N.Y.S.2d 213, 215 (Dist. Ct. Nassau County 1959).

6. For the purposes of this Note, a municipality or municipal corporation is a

notice⁷ of a dangerous condition and fails to act within a reasonable period of time to repair the defect, liability is imposed for any resulting injury.⁸ Accordingly, prior written notice statutes interfere with the traditional negligence doctrine of constructive notice. This Note examines traditional common law negligence as it relates to municipal liability. The procedural requirements and legislative history of the Pothold Law are analyzed. In addition, the legal and policy considerations surrounding its enactment are discussed. This Note recommends an alternative solution to the statute which takes into account both the procedural inequities of the law and the city's financial problems. A balance must be struck between the rights of injured parties and the need of the city to have a reasonable opportunity to effect repairs.

II. Traditional Negligence Approach to Municipal Liability

A municipal corporation has a dual function⁹ at common law; it operates as a political and governmental body¹⁰ and it acts in a

political unit which has a corporate status, quasi-independent from the state, and a governmental status which is an extension of the state. *See* 18 E. McQUILLIN, *supra* note 5, §§ 53.23-53.59. Included in this definition are cities, towns and villages.

7. Constructive notice is said to exist when a municipality is aware of facts and circumstances which, by the exercise of reasonable diligence, would lead to the knowledge required. 19. E. McQUILLIN, *supra* note 5, § 54.102, at 287; McDermot v. New York, 287 F.2d 49, 50 (2d Cir. 1961). In West Virginia, however, there is a contrary case. In *Burcham v. City of Mullens*, 139 W. Va. 399, ___, 83 S.E.2d 505, 508 (1954), the plaintiff was injured due to a latent defect in public steps. The defendant asserted that the plaintiff has assumed the risk because she had constructive notice of the latent condition which arose from her knowledge of a related patent defect. The court held, however, that constructive notice could not be imputed to plaintiff in the manner defendant asserted. 139 W. Va. at ___, 83 S.E.2d at 512.

8. 19 E. McQUILLIN, *supra* note 5, § 54.102, at 287. *Barrett v. City of Claremont*, 41 Cal. 2d 70, 73, 256 P.2d 977, 982-83 (1953); *Griffin v. City of Cincinnati*, 162 Ohio St. 232, ___, 123 N.E.2d 11, 16 (1954). *Glen v. Oakdale Contracting Co.*, 257 N.Y. 497, 500, 178 N.E. 770, 771 (1931); *Michaels v. City of New York*, 231 A.D. 455, 457-58, 247 N.Y.S. 781, 783-85 (1st Dep't 1931). Local L. No. 82, § 2, *infra* note 36. *See also* Durst, *Prior Written Notice for Municipal Liability*, 13 TRIAL LAW. Q. 52, 52 (1980). Durst points out that under the prior written notice law fault is not the predominant means of determining the rights and liabilities of the parties. *Id.*

9. For a general discussion of a municipal corporation's dual function, *see* W. PROSSER, LAW OF TORTS § 131, at 977-84 (4th ed. 1971). For a more specific discussion, *see* 18 E. McQUILLIN, *supra* note 5, §§ 53.23-53.59; 1 E. YOKLEY, MUNICIPAL CORPORATIONS, §§ 54-56 (1958).

10. W. PROSSER, LAW OF TORTS § 131, at 979 (4th ed. 1971). Governmental functions are those which can only be performed by the government and are govern-

proprietary capacity.¹¹ Although negligent governmental acts performed by a municipality are insulated from liability,¹² if a municipality's acts are considered proprietary, the municipality is liable for its negligence in the same manner as a private corporation.¹³ Most courts treat a city's obligation to maintain its streets in a reasonably safe condition for ordinary use¹⁴ as a proprietary function.¹⁵ As a result, a city is liable for the negligent performance of this duty.¹⁶

mental in nature. An example of such a function is the government's duty to make and enforce adequate laws and regulations. *Id.* See also *Whittaker v. Village of Franklinville*, 265 N.Y. 11, 14, 191 N.E. 716, 717-18 (1934).

11. Proprietary functions are those performed by a private corporation and include such duties as supplying water, gas or electricity to the public. W. PROSSER, *LAW OF TORTS* § 131, at 980-83 (4th ed. 1971). See, e.g., *C.C. Anderson Stores Co. v. Boise Water Corp.*, 84 Idaho 355, ___, 372 P.2d 752, 754 (1962) (maintenance and operation of a water system is a proprietary function for which the city is liable); *In re Rapid Transit R.R. Comm'rs*, 197 N.Y. 81, 96, 90 N.E. 456, 460 (1909) (construction of subway is a proprietary function); *Hanks v. City of Port Arthur*, 8 S.W.2d 331, 332-33 (Tex. Ct. Civ. App. 1928) (maintenance of streets and sidewalks considered a proprietary function). *But see* *City of Little Rock v. Holland*, 184 Ark. 381, 42 S.W.2d 383, 384 (1931) (lighting of streets is a governmental, as opposed to proprietary, function).

12. W. PROSSER, *LAW OF TORTS* § 131, at 979 (4th ed. 1971). See also *Bailey v. City of New York*, 3 Hill 531, 539-44 (1842); 3 E. YOKLEY, *MUNICIPAL CORPORATIONS* § 446, at 47-48 (1958).

13. W. PROSSER, *LAW OF TORTS* § 131, at 49 (4th ed. 1971). See also *Rotella v. McGovern*, 109 R.I. 529, 288 A.2d 258 (1972), which held a city liable for damages because of its negligence in maintaining a sewer, a proprietary function. *Id.* at 533, 288 A.2d at 260.

14. 19 E. MCQUILLIN, *supra* note 5, § 54.13, at 38; *Pearson v. Boise City*, 80 Idaho 494, ___, 333 P.2d 998, 999-1000 (1959); *City of Beaumont v. Henderson*, 349 S.W.2d 301, 303 (Tex. Ct. Civ. App. 1961). Cf. *Clark v. City of Buffalo*, 288 N.Y. 62, 65, 41 N.E.2d 459, 460 (1942) (public park).

Locality, climate and weather conditions should be considered in determining what is a reasonable degree of care. *Sand v. City of Little Falls*, 237 Minn. 233, ___, 55 N.W.2d 49, 52 (1952). Included in this duty of reasonable care is a duty of reasonable inspection. *Ness v. City of San Diego*, 144 Cal. App. 2d 668, ___, 301 P.2d 410, 412 (Dist. Ct. App. 1956); *Sambs v. City of Brookfield*, 66 Wis. 2d 296, 307, 224 N.W.2d 582, 588 (1975).

15. W. PROSSER, *LAW OF TORTS* § 131, at 982 (4th ed. 1971). See also *Myers v. City of Palmyra*, 355 S.W.2d 17, 18-19 (Mo. 1962). Cf. *Augustine v. Town of Brant*, 249 N.Y. 198, 163 N.E. 732 (1928) (public park), *contra*, *Gitcher v. City of Farmersville*, 137 Tex. 12, 151 S.W.2d 565 (1941); *Niblock v. Salt Lake City*, 100 Utah 573, 111 P.2d 800 (1941); *Erickson v. Village of West Salem*, 205 Wis. 107, 236 N.W.579 (1931).

16. 19 E. MCQUILLIN, *supra* note 5, § 54.03b, at 14-15. See also *Flannagan v. Lee*, 56 Tenn. App. 60, 409 S.W.2d 385 (Ct. App. 1966); *Rotker v. City of New York*, 124 N.Y.S.2d 231 (Mun. Ct. Bronx County 1953).

If a municipality causes a defective condition in a street or a sidewalk, it is liable regardless of whether it received notice of the defect.¹⁷ If the defect arises from natural deterioration or has been caused by a third party, a city will not be liable for resulting injuries unless it had actual or constructive notice of the dangerous condition.¹⁸ Constructive notice is found where an element of conspicuousness or notoriety should have alerted the city as to the existence of a defect.¹⁹ Notice is implied if the defect has existed for a substantial period of time, such that municipal authorities, in exercising reasonable care and diligence, could have known of its existence and made the repairs.²⁰ This determination depends on the character, notoriety and location of the defect.²¹ By way of contrast, injuries resulting from latent defects which are not due to faulty municipal work, and which could not have been discovered by ordinary care and diligence, do not result in the city's liability unless the city has actual notice of the defect.²² In cases of constructive notice, common law imposes liability because a city has absolute control over its streets, including the power to build, improve and maintain them.²³ It is logical, therefore, that a city be liable for its negligence in exercising these

17. 19 E. McQUILLIN, *supra* note 5, § 54.104, at 291. *See also* Rupp v. New York City Transit Auth., 15 A.D.2d 800, 801, 224 N.Y.S.2d 1007, 1009-10 (2d Dep't. 1962); Batten v. South Seattle Water Co., 65 Wash. 2d 547, 551, 398 P.2d 719, 722 (1965).

18. 19 E. McQUILLAN, *supra* note 5, § 54.102, at 288-89; Smith v. District of Columbia, 189 F.2d 671, 674 (D.C. Cir. 1951); Barrett v. City of Claremont, 41 Cal. 2d 70, 72, 256 P.2d 977, 979 (1953).

19. City of San Diego v. Perry, 124 F.2d 629, 630-31 (9th Cir. 1941), which held that a break in the grade of the sidewalk which was a drop of three and one half inches per two feet was conspicuous and the city was deemed to have constructive notice. *Id.* at 630-31. *See also* Bottalico v. City of New York, 281 A.D. 339, 119 N.Y.S.2d 704 (1st Dep't 1953); Gibbons v. City of New York, 200 Misc. 699, 700, 110 N.Y.S.2d 731, 732 (Mun. Ct. Queens County 1951).

20. *See* notes 26-34 *infra* and accompanying text. Peterson v. Kansas City, 324 Mo. 454, ___, 23 S.W.2d 1045, 1048 (1929); Dahl v. Nelson, 97 N.D. 400, ___, 56 N.W.2d 757, 760 (1953).

A New York court held that a municipality can be charged with constructive notice if the defect exists for four months. Napoli v. City of New York, 144 N.Y.S.2d 110, 114 (N.Y.C. Ct. N.Y. County 1955). A Georgia court imputed constructive notice to a municipality when the defect existed for less than a month. City of Thomson v. Poss, 93 Ga. App. 663, ___, 92 S.E.2d 557, 558 (1956). *See generally* 19 E. McQUILLIN, *supra* note 5, § 54.110, at 312-23.

21. Gilson v. City of Anderson, 141 Ind. App. 180, ___, 226 N.E.2d 921 (1967).

22. 19 E. McQUILLIN, *supra* note 5, § 54.111, at 326-27. *See* Barrett v. City of Claremont, 41 Cal. 2d 70, 256 P.2d 977 (1953); Hart v. Butler, 393 S.W.2d 568 (Mo. 1965); Toreen v. City of Mount Vernon, 243 A.D. 612, 276 N.Y.S. 379 (2d Dep't 1935).

23. 19 E. McQUILLIN, *supra* note 5, § 54.03c, at 18.

powers.²⁴ Placing the burden of inspection on the public is unfair because the public has neither the resources nor the organization to undertake such a task.²⁵

In addition to the general common law rule of imposing liability on a city for negligently maintaining its public streets and sidewalks when the city has adequate notice of defects, New York common law requires claimants to prove that the defect which caused the injury was not trivial in nature.²⁶ This rule, commonly known as the "trivial defect rule," has a long tradition in New York and was refined and clarified in *Loughran v. City of New York*.²⁷ In *Loughran*, plaintiff sued the city to recover for injuries sustained when he fell into a hole in Washington Square Park. The city contended that it was not liable because there was no evidence that the hole was more than four inches deep and was not trivial in nature.²⁸ In rejecting the city's conten-

24. *Id.* § 54.05, at 16-18. See *Millas v. Town of Wilson*, 222 N.C. 340, ___, 23 S.E.2d 42, 44 (1942).

25. In *Hunter v. North Mason High School*, 85 Wash.2d 810, 539 P.2d 845 (1975), a Washington State notice of claim statute which required that notice be provided within 120 days of the injury was declared invalid. *Id.* at 818, 539 P.2d at 850. The Washington Supreme Court observed that governmental subdivisions "possess special investigative resources" which make them better equipped to investigate and defend than most private tortfeasors. *Id.* at 816, 539 P.2d at 849. Although this statement was made in reference to the notice of claim statute, it is analogous to a notice of defect statute. The governmental entity is far better equipped to inspect streets than the private individual. See also Durst, *Prior Written Notice for Municipal Liability*, 13 TRIAL LAW. Q. 52, 63 (1980). Initially it was necessary to encourage cities to pave streets and sidewalks without concern for civil liability, especially because methods of paving were new and unreliable. It may have been desirable, at the time, to allow cities to avoid their duties to maintain streets and sidewalks by conditioning or limiting their liability for negligent maintenance of those structures. *Id.* Because of the increased size and sophistication of cities as well as the changing expectations of citizens, traditional negligence concepts ought to be implemented. *Id.*

26. *Tripoli v. State of New York*, 72 A.D.2d 823, 824 (3d Dep't 1979). Here, plaintiff fractured his wrist when he fell into a hole in a state park parking lot. The court held that claimant failed to show that the hole represented anything more than a trivial defect or that it was so out of character with the surroundings as to be a foreseeable cause of the accident. Because the state had no reasonable means of discovering the defect it could not be charged with constructive notice. *Id.* See also *Fox v. Brown*, 15 N.Y.2d 597, 598, 203 N.E.2d 650, 255 N.Y.S.2d 263 (1964); *Scally v. State of New York*, 26 A.D.2d 606 (3d Dep't 1966).

The trivial defect rule originated as the "four inch rule." Cities in New York State were not liable unless the plaintiff could prove that the defect was at least four inches deep. *Beltz v. City of Yonkers*, 148 N.Y. 67, 70, 42 N.E. 401, 402 (1895). Although the cases following this rule did not actually specify that the defect had to be greater than four inches, the later cases created the name "four inch rule" because the earlier cases which exempted cities from liability involved defects which were smaller than four inches.

27. 298 N.Y. 320, 83 N.E.2d 136 (1948) (per curiam).

28. *Id.* at 321, 83 N.E.2d at 136-37.

tion, the court held that a municipality's liability does not depend on the depth of the defect, but rather on whether the city has maintained the public thoroughfares in a reasonably safe condition.²⁹

Although the *Loughran* decision is interpreted as the abandonment of a mathematical standard to determine liability, it is not an abandonment of the trivial defect rule itself.³⁰ Cases decided subsequent to *Loughran* continue to hold the municipality liable only when the defect is not trivial.³¹ For example, in *Lipinsky v. City of New York*,³² the plaintiff fell on a defect in the sidewalk consisting of a separation of approximately one inch in the metal curbing. An action was brought against the city for negligent maintenance of the sidewalk.³³ The court held that the defect was of such a minor character that it "could not be" the cause of the plaintiff's fall.³⁴ Therefore, New York common law requires a plaintiff to prove the following four elements in order to prevail in a negligence action against the city: first, that a defect in a sidewalk or street was more than trivial in nature; second, that the city had actual or constructive notice of the defect; third, that the city breached its duty to repair the defect; and fourth, that the injury to plaintiff was proximately caused by the defect. With the enactment of the Pothole Law, however, common law principles have been modified significantly.

III. The Pothole Law

The New York City prior written notice statute eliminates the doctrine of constructive notice and allows an injured plaintiff to

29. *Id.* at 322, 83 N.E.2d at 137.

30. *Parker v. Port Auth.*, 22 Misc. 2d 421, 422, 197 N.Y.S.2d 975, 976-77 (N.Y.C. Mun. Ct. Bronx County 1959). Plaintiff fell in a hole in the floor of the Port Authority Bus Terminal. Substantial evidence concerning the size of the hole was adduced. The court stated that "the *Loughran* case was merely the abandonment of a mathematical measure of what is a trivial defect." *Id.* at 422, 197 N.Y.S.2d at 976-77. Instead the test was whether the street was reasonably safe under the "circumstances in each case." *Id.* at 422, 197 N.Y.S.2d at 977.

31. *Tripoli v. State of New York*, 72 A.D.2d 823, 824 (3d Dep't 1979); *Mascaro v. State of New York*, 46 A.D.2d 941, 362 N.Y.S.2d 78 (3d Dep't 1974); *Scally v. State of New York*, 26 A.D.2d 606, 606-07 (3d Dep't 1966); *Lipinsky v. City of New York*, 11 Misc. 2d 734, 735 (Sup. Ct. N.Y. County 1957), *aff'd*, 8 A.D.2d 600 (2d Dep't 1959).

32. 11 Misc. 2d 734 (Sup. Ct. New York County 1957).

33. *Id.*

34. *Id.* at 735. In *Mascaro v. New York*, 46 A.D.2d 941 (3d Dep't 1974), plaintiff tripped on a curb which was raised approximately two inches above the adjacent sidewalk. In trying to steady herself, plaintiff fell on a small depression in the curb, *id.*, and brought an action against New York State for negligence. The appellate division denied plaintiff recovery and held that the defect was trivial in nature and possessed none of the characteristics of a trap or a snare. *Id.*

recover only if the city has written notice.³⁵ The statute provides in pertinent part:

No civil action shall be maintained against the city for damage to property or injury to person . . . sustained in consequence of any street, highway, bridge . . . sidewalk or crosswalk, . . . being out of repair, unsafe, dangerous or obstructed, unless . . . written notice of the defective . . . condition . . . was actually given to the commissioner of transportation . . . and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect . . . or the place otherwise made reasonably safe.³⁶

35. Local L. No. 82, *supra* note 1.

36. Local L. No. 82. The statute provides in full:

d. 1. As used in this subdivision:

(a) The term "street" shall include the curbstone, an avenue, underpass, road, alley, lane, boulevard, concourse, parkway, road or path within a park, park approach, driveway, thoroughfare, public way, public square, public place, and public parking area.

(b) The term "sidewalk" shall include a boardwalk, underpass, pedestrian walk or path, step and stairway.

(c) The term "bridge" shall include a viaduct and an overpass.

2. No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice, *or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgement from the city of the defective, unsafe, dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe.*

3. The commissioner of transportation shall keep an indexed record in a separate book of all written notices which the city receives and acknowledgement of which the city gives of the existence of such defective, unsafe, dangerous or obstructed conditions, which record shall state the date of receipt of each such notice, the nature and location of the condition stated to exist and the name and address of the person from whom the notice is received. This record shall be a public record. The record of each notice shall be maintained in the department of transportation for a period of three years after the date on which it is received and shall be preserved in the municipal archives for a period of not less than ten years.

4. Written acknowledgement shall be given by the department of transportation of all notices received by it.

In addition, the statute does not require fifteen days notice prior to injuries resulting from defects which remained unrepaired, though the city received written notice after the same defect caused a separate injury.³⁷

The city had four major reasons for enacting the statute: to modernize the Administrative Code and bring it into conformity with almost all other cities in New York State;³⁸ to reduce the amount of money spent on sidewalk and sidewalk claims;³⁹ to eliminate the vast number of false and highly exaggerated claims;⁴⁰ and to provide the impetus for street and sidewalk repair.⁴¹

The Office of the Comptroller of the City of New York initially proposed the adoption of a prior notice statute after analyzing New York City sidewalk and roadway claims in 1977.⁴² The purpose of the analysis was to compute the losses the city had incurred from sidewalk and roadway claims and project future costs.⁴³ The ulti-

37. *Id.* Also, the city will be liable if it acknowledges the defect in writing and fails to repair the defect within 15 days. *Id.*

38. Letter from Allen G. Schwartz, Corporation Counsel, City of New York, to Hon. Thomas J. Cuite, Vice-Chairman and Majority Leader, Council of the City of New York 6 (July 27, 1979). With the enactment of the New York City prior notice bill, 61 out of 62 cities in New York State have prior written notice statutes. Besides Yonkers, New York City is the only city in New York State which does not have a prior written notice law. For a list of the cities with prior notice laws, see *Sidewalk and Roadway Analysis*, *supra* note 2, at 10 (Table 4). In addition, five incorporated towns and fifty-eight incorporated villages of the State of New York have prior written notice laws. *Id.* at 11 (Table 5). It is important to challenge the law in New York City because the potential for widespread harm is much greater due to the city's enormous size and population. The statutory authorization is discussed at notes 74-76 *infra* and accompanying text.

39. See note 3 *supra*.

40. Harrison Goldin, Comptroller of the City of N.Y., *Hearings on Amendments to ch. 16, tit. A, § 394a-1.0 of the Administrative Code of the City of N.Y. Before the Comm. on Governmental Operations* (Aug. 6, 1979) [hereinafter cited as *Hearings on Amendments*]. See also N.Y. County Lawyers Ass'n Maj. Report on City Council Bill Interim No. 687 1 (Oct. 29, 1979).

41. *Hearings on Amendments*, *supra* note 40, at 8. It is questionable whether the city has actually increased its repair activities. Figures reported by Richard T. Watson, Director of Management Services, show that since June 4, 1980, the effective date of the statute, through July 31, 1981, the Department of Transportation received 74,982 defect notices. Of that amount, 73,546 passed the initial screening which determines whether the information in the notice is sufficient for repairmen to locate the potholes. The eligible notices were forwarded to the Borough Offices of the Bureau of Highway Operations for resolution. As of August 17, 1981, 40,624 or 55% were repaired and 32,922 or 45% remained unrepaired. Letter to author from Richard T. Watson, Director of Management Services (Aug. 17, 1981) (letter on file at Fordham Urban Law Journal).

42. *Sidewalk and Roadway Analysis*, *supra* note 2.

43. *Id.* at 1. This was the third report in a series which focused on the payment process of claims against the city. The first report, issued in 1975, focused on

mate goal of the study was to recommend an efficient means to reconstruct city streets before accidents occurred, rather than react to defective conditions after damage claims had been filed.⁴⁴ In order to achieve these goals, the Office of the Comptroller recommended that the city enact a statute pursuant to the General Municipal Law⁴⁵ requiring that the city receive prior written notice before being held liable for sidewalk and roadway defects.⁴⁶ It contended that the enactment of such a statute, by substantially reducing the number of awards paid out, would provide the city with time and money to perform needed construction.⁴⁷ In addition, it was argued that the city would be better able to determine the validity of alleged claims.⁴⁸

After referral to the Committee on Governmental Operations,⁴⁹ two public hearings were held.⁵⁰ The testimony in favor of the bill stressed that the city would save an estimated \$10 million per year⁵¹ because the number of claims brought against other cities in New York State with prior written notice statutes had been minimal.⁵² Special interest groups, such as the New York State Trial Lawyers Association and the Automobile Club of New York which testified against the bill, claimed that it was oppressive to the old, poor and

defective sidewalks. The second report, issued in 1976, focused on the city's driver training program. *Id.* at 1-2.

44. *Id.* at 1.

45. Section 50-g of the General Municipal Law, N.Y. GEN. MUN. LAW § 50-g (McKinney 1977), enables the city to enact a prior written notice statute under certain conditions. *See* note 75 *infra*.

46. Sidewalk and Roadway Analysis, *supra* note 2, at 9.

47. *Id.* *See* note 3 *supra*.

48. Sidewalk and Roadway Analysis, *supra* note 2, at 9.

49. Report of the Comm. on Governmental Operations, Interim No. 687-A Minutes, 1466 (May 22, 1979) [hereinafter cited as Committee Report].

50. The first hearing was held on August 13, 1979 and the second hearing was held on August 22, 1979. *Id.*

51. Committee Report, *supra* note 49. *See* note 3 *supra*.

52. *Id.* The cities which the Comptroller's Office referred to were Rochester, Buffalo, Syracuse and Albany. Research performed concerning other large New York State cities revealed that there were substantial decreases in the dollar amounts of claims paid out in those cities since the passage of prior written notice statutes. Letter from Helen Becker, Legislative Analyst, to Stanley Schlein, Assistant Counsel to Majority Leader of the City Council (Nov. 5, 1979).

Corporation Counsel in Rochester indicated that since the enactment of a prior written notice statute, claims and payments were "getting close to zero." Letter from Helen Becker to Stanley Schlein (Oct. 18, 1979). In Buffalo, only 200 to 300 claims per year are filed and only 5% of the claimants recover from the city. Letter from Allen G. Schwartz to Hon. Thomas J. Cuite 5 (July 27, 1979). Syracuse received only 50 claims in 1978. In Albany, only one sidewalk case was litigated and the plaintiff elected to discontinue it before the merits were heard. *Id.* at 6.

infirm.⁵³ In November, 1979, the Committee on Governmental Operations recommended the adoption of the legislation and the bill was enacted.⁵⁴

The statute sets forth certain duties that the city must perform upon receipt of notice of a defect, but does not articulate the type of information which constitutes proper written notice. As a result, the city developed the following procedure for reporting defects.⁵⁵ When an individual reports a pothole by sending a letter of notice,⁵⁶ the city acknowledges receipt by sending a form⁵⁷ that must be completed and returned to the Commissioner of Transportation.⁵⁸ If the

53. Committee Report, *supra* note 49. Other special interest groups included negligence lawyers and Block Associations.

54. Committee Report, *supra* note 49. The pothole law passed in the City Council by a 24 to 16 vote and became effective on June 4, 1980.

55. Although the statute does not describe the form which the notice must take, § 3 of the pothole law requires that the notices be kept by the Commissioner of Transportation in an indexed record open to the public. Local L. No. 82, § 3. The record must state the date of receipt of the notice, the nature and location of the defective condition and the name and address of the person who submitted the notice. *Id.* The notices must be held by the Department of Transportation for three years after the date of receipt and then be preserved in the municipal archives for a period of not less than three years. *Id.* The purpose of the section is to provide a means by which an individual injured by a street defect may determine whether a right exists to bring an action against the city. An individual is not permitted to search for the notice, but must pay a fee to have the search performed by a city official. Once the search is completed, the person is notified of the results. N.Y.L.J., Dec. 16, 1980, at 3, col. 1.

56. It is the city's view that the fifteen days it has to repair the defect starts to run as of the receipt of the initial letter. Interview with Jeffrey Glen, Special Assistant, Corporation Counsel, New York City (Aug. 11, 1981).

57. The form is entitled "Local Law 82. Notice of Street/Sidewalk Defect." The form can be obtained at Transportation Department headquarters at 40 Worth Street, Room 1634, New York, New York and the department's borough offices.

The form is printed in both English and Spanish and asks for the individual's name, address, telephone number and the exact location of the pothole by address. If no street number is available, the number of feet the pothole is from an intersection or other fixed object is requested. Once the form is received by the Department of Transportation, it is attached to the original letter of notice and kept in an indexed record.

58. The Commissioner of Transportation is the head of the Department of Transportation. 1 N.Y. CITY CHARTER § 2901 (Supp. 1980-81). He may appoint four deputies, one of whom shall oversee highway operations. *Id.* § 2902. His powers relevant to the pothole law include:

(1) preparing and transmitting budget estimates for the department. *Id.* § 2903 (a)(1).

(2) submitting to the mayor proposals for amendment of any resolutions, rules or regulations of any city agency which affect traffic conditions in the city, and proposing legislation necessary to implement such proposals. *Id.* § 2903 (b)(8).

person reporting the defect fails to return the form, a question will arise as to whether the original letter constitutes proper notice.

In *Matter of Big Apple Pothole and Sidewalk Protection Committee, Inc.*,⁵⁹ the sufficiency of maps depicting the location of thousands of potholes was questioned. The maps had been submitted to the city by the Big Apple Pothole and Sidewalk Protection Committee (the Big Apple Committee), a group formed by the New York State Trial Lawyers Association.⁶⁰ The court held that the maps constituted adequate notice to the city of the existence of potholes.⁶¹ The maps were found to be

[m]ore precise in terms of the type of defects and their location than the forms previously used by the petitioner and accepted by the respondent. Moreover, the maps [were] far more detailed than respondent's own forms for such notification.⁶²

The court ordered the New York City Department of Transportation to file the maps in the indexed record of notices.⁶³ Despite the court's holding, it will be difficult to ascertain whether in a particular case sufficient notice has been provided because the statute does not clearly establish what constitutes prior written notice.⁶⁴

The passage of the New York City prior written notice law has provoked debate among city officials, special interest groups and concerned citizens.⁶⁵ This controversy centers around both legal and

(3) preparing and submitting to the mayor recommendations and proposals for the improvement of existing streets, highways and parkways. *Id.* § 2903 (b)(9).

(4) repairing all public roads, streets, highways and parkways. *Id.* § 2903 (c)(3).

59. N.Y.L.J., July 24, 1981, at 6, col. 1.

60. The Big Apple Pothole and Sidewalk Protection Corporation is a nonprofit corporation whose president, Sheldon Albert, is a negligence attorney. Because negligence lawyers are more apt to be affected by the pothole law, the corporation was established to prepare lists of street and sidewalk defects and file them with the city in order to protect future injured claimants. See *Lawyers Group Files Long Brief on City Hazards*, N.Y. Times, June 5, 1980, at B3, col. 8.

61. N.Y.L.J., July 24, 1981, at 6, col. 2.

62. *Id.* at cols. 1, 2.

63. *Id.*

64. For example, if a letter is sent stating that there are potholes on the Brooklyn Bridge, the city would have a strong defense that proper notice was not given because such a letter is too vague. This is because there could be one hundred potholes on the Brooklyn Bridge. There will be many cases, however, where notice is neither as specific as a map indicating exact locations of potholes, nor as vague as the Brooklyn Bridge example. The notices which fall into this gray area will invite litigation. See, e.g., N.Y. County Lawyers Ass'n, Maj. Report on City Council Bill Interim No. 6873 (Oct. 29, 1979).

65. See note 53 *supra* and accompanying text.

policy considerations. Groups opposing the Pothole Law present three legal arguments: that the law is unconstitutional;⁶⁶ that it is a procedural device to reinstate the doctrine of sovereign immunity;⁶⁷ and that it derogates traditional common law negligence.⁶⁸

The New York State Constitution provides:

[E]very [city] shall have the power to adopt and amend local laws not inconsistent with the . . . constitution or any general law [of the state] . . . relating to . . . the acquisition, care, management and use of its . . . streets and property⁶⁹

In the New York Court of Claims Act,⁷⁰ the state waives its sovereign immunity and consents to have its liability "determined in accordance with the same rules of law as are applied to actions in the [state] supreme court against individuals or corporations" ⁷¹ It is argued that the Pothole Law is inconsistent with the Court of Claims Act because it eliminates constructive notice.⁷² Such an inconsistency is prohibited by the New York State Constitution and, therefore, critics of the Pothole Law contend that it is unconstitutional.⁷³ This argument, however, fails to consider statutory authority which allows political subdivisions to limit their liability in suits arising from street and sidewalk defects of which they had no prior written notice.⁷⁴

66. There are three arguments declaring the Pothole Law unconstitutional. First, that it is inconsistent with the Court of Claims Act. Second, that it violates the equal protection clause of the United States and New York State constitutions. Third, that it violates standards of due process. See notes 69-137 *infra* and accompanying text.

67. See notes 138-143 *infra* and accompanying text. Sheridan Albert, President, New York State Trial Lawyers Ass'n, *Statement Before Comm. on Governmental Operations* (Aug. 6, 1979). See also N.Y. County Lawyers Ass'n, *Maj. Report on City Council Bill Interim No. 687 1* (Oct. 29, 1979).

68. See notes 144-146 *infra* and accompanying text. See generally Durst, *Prior Written Notice for Municipal Liability*, 13 TRIAL LAW. Q. 52 (1980).

69. N.Y. STATE CONST. art. IX, § 2(c)(6) (McKinney 1969).

70. N.Y. CT. CL. ACT § 8 (McKinney 1963). For a general discussion of the Court of Claims Act and prior written notice statutes, see Durst, *Prior Written Notice for Municipal Liability*, 13 TRIAL LAW. Q., 52, 64-69 (1980).

71. N.Y. CT. CL. ACT § 8 (McKinney 1963). See note 139 *infra*.

72. Durst, *Prior Written Notice for Municipal Liability*, 13 TRIAL LAW. Q. 52, 66 (1980). See also Fullerton v. City of Schenectady, 285 A.D. 545, 551, 138 N.Y.S.2d 916, 922 (Coon, J., dissenting), where it was stated that the prior written notice statute in Schenectady was inconsistent with the public policy expressed in the Court of Claims Act.

73. Durst, *Prior Written Notice for Municipal Liability*, 13 TRIAL LAW. Q. 52, 66 (1980).

74. N.Y. SECOND CLASS CITIES LAW § 244 (McKinney Supp. 1980-81), provides that no action shall be maintained against a city for injuries obtained as a result of a defect in a street or sidewalk unless written notice of the defect was actually given to the commissioner of public works and there was a failure to repair within a reason-

The Pothole Law was enacted pursuant to section 50-g of the General Municipal Law⁷⁵ which provides that such a statute may be enacted if the city keeps an indexed record of all written notices of defects in all streets or sidewalks.⁷⁶ The Pothole Law is permissible under state law because the language of the statute conforms to the requirements of the General Municipal Law. Even if it is determined that the General Municipal Law conflicts with the Court of Claims Act, the General Municipal Law would control. First, the law specifi-

able time either after notice was given or the city had constructive notice of the defect. *Id.* N.Y. TOWN LAW § 65-a (McKinney 1965), provides *inter alia* that no action shall be maintained against any town unless the town clerk received prior written notice of the defect and had a reasonable time to repair it, or the town had constructive notice of the defect. *Id.* N.Y. VILLAGE LAW § 6-628 (McKinney 1973), provides that no action shall be maintained against a village unless the village clerk received prior written notice of the defect and had a reasonable time thereafter to repair it. *Id.*

75. N.Y. GEN. MUN. LAW § 50-g (McKinney 1977). Section 50-g provides:

1. Wherever any statute, city charter or local law provides that no civil action shall be maintained against a city for damages or injuries to person or property sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being out of repair, unsafe, dangerous or obstructed, or in consequence of the existence of snow or ice thereon, unless it appear that written notice of the defective, unsafe, dangerous or obstructed condition, or of the existence of the snow or ice, was actually given to the city or its specified officer or employee and there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of, or to cause the snow or ice to be removed, or the place otherwise made reasonably safe, the city shall keep an indexed record, in a separate book, of all written notices which it shall receive of the existence of such defective, unsafe, dangerous or obstructed condition, or of such snow or ice, which record shall state the date of receipt of the notice, the nature and location of the condition stated to exist, and the name of and address of the person from whom the notice is received.

2. Where the statute, charter or local law requires that the written notice be given to a specified city officer or employee the record shall be made and kept by the person so specified. Where the statute, charter or local law requires that the written notice be given to any of several specified city officers or employees, or omits to specify the officer or employee to whom the written notice shall be given, the record shall be made and kept by an officer or employee designated for that purpose by the governing body of the city. In the absence of such designation the record shall be made and kept by the commissioner of public works of the city or, if there be no officer of that title, by an officer exercising corresponding duties. The record of notices of defects shall be a public record. The record of each notice shall be preserved for a period of five years after the date it is received.

3. This section shall be applicable notwithstanding any inconsistent provisions of law, general, special or local, or any limitation contained in the provisions of any city charter.

76. N.Y. GEN. MUN. LAW § 50-g(2) (McKinney 1977).

cally states: "[t]his section shall be applicable notwithstanding any inconsistent provisions of law, general, special or local, or any limitation contained in the provisions of any city charter."⁷⁷ Second, it is a general rule of statutory construction that "[s]pecific terms prevail over the general in the same or another statute which otherwise might be controlling."⁷⁸ In fact, the New York State Statutes Law specifically provides that "[w]hen there is a general and a particular provision in the same statute, the general does not overrule the particular but applies only where the particular enactment is inapplicable."⁷⁹ Therefore, because the General Municipal Law specifically enables cities to enact prior written notice statutes, it prevails over the Court of Claims Act, a general waiver of sovereign immunity. Furthermore, because the city's duty to repair street and sidewalk defects is a proprietary function,⁸⁰ negligence in performing that duty results in liability.⁸¹ Sovereign immunity only applies to governmental functions.⁸² When the state waived its sovereign immunity as well as that of all its political subdivisions,⁸³ the waiver applied only to governmental functions.⁸⁴ Section 8 of the Court of Claims Act, therefore, does not apply to a city's liability with respect to street defects.⁸⁵

77. N.Y. GEN. MUN. LAW § 50-g(3) (McKinney 1977).

78. *D. Ginsberg and Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932). See also *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973); *Clifford F. MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1944); *Baltimore Nat'l Bank v. Tax Comm'n*, 297 U.S. 209, 215 (1936); *Thielebeule v. M/S Nordsee Pilot*, 452 F.2d 1230, 1232 (2d Cir. 1971); *People v. Mobil Oil Corp.*, 48 N.Y.2d 192, 200, 397 N.E.2d 724, 728, 422 N.Y.S.2d 33, 38 (1979); *County of Rensselaer v. Capital Dist. Transp. Auth.*, 42 A.D.2d 445, 447, 349 N.Y.S.2d 20, 23 (3d Dep't 1973).

79. N.Y. STATUTES LAW § 238 (McKinney 1971).

80. See *Augustine v. Town of Brant*, 249 N.Y. 198, 163 N.E. 732 (1928). See generally *Torts: Liability of Municipality for Injuries Occurring in Public Parks*, 28 CORNELL L. Q. 372 (1943); W. PROSSER, LAW OF TORTS § 131, at 982 (4th ed. 1971).

81. *Rotker v. City of New York*, 124 N.Y.S.2d 231 (Mun. Ct. Bronx County 1953). See notes 9-18 *supra*.

82. See *Whittaker v. Village of Franklinville*, 265 N.Y. 11, 191 N.E. 716 (1934). See generally W. PROSSER, LAW OF TORTS § 131, at 979 (4th ed. 1971).

83. Courts have interpreted the state's waiver of sovereign immunity to extend to its political subdivisions as the latter are merely an extension of the arm of the state. *Bernardine v. City of New York*, 294 N.Y. 361, 365, 62 N.E.2d 604, 605 (1945); *Cox v. Village of Greenwich*, 33 A.D.2d 264, 266, 306 N.Y.S.2d 987, 990 (3d Dep't 1970); *Hay v. Town of Onondaga*, 194 Misc. 773, 776, 87 N.Y.S.2d 473, 476 (Sup. Ct. Onondaga County 1949).

84. See *Fullerton v. City of Schenectady*, 285 A.D. 545, 547, 138 N.Y.S.2d 916, 918-19 (3d Dep't 1955), *aff'd*, 309 N.Y. 701, 95 N.E.2d 48 (1955), *appeal dismissed*, 350 U.S. 980 (1956).

85. 285 A.D. at 548, 138 N.Y.S.2d at 920.

Several courts in New York State have upheld the constitutionality of prior written notice statutes. In *MacMullen v. City of Middletown*,⁸⁶ a city resident sustained injuries incurred in a fall caused by the accumulation of snow and ice on the sidewalk and brought suit challenging the validity of the city's prior written notice statute.⁸⁷ The New York Court of Appeals held that the statute was constitutional⁸⁸ because a municipal corporation is an agent of the state and exercises part of the state's sovereign power.⁸⁹ In its exercise of this power, the court held that a municipality may grant, deny or restrict the power to maintain a private action against it.⁹⁰

In *Hayward v. Schenectady*,⁹¹ the appellate division declared a prior written notice law unconstitutional because the court deemed it inconsistent with the Second Class Cities Law, a general law of the state.⁹² The Second Class Cities Law provides that a city is immune from civil actions arising from street defects unless it receives prior written notice of the defect or that the defect existed for a period of time long enough to have been discovered and remedied through the exercise of reasonable care and diligence.⁹³ Because the Schenectady law did not provide for constructive notice, the court determined that the local law contravened the general state law and was unconstitutional.⁹⁴

The *Hayward* decision was subsequently overruled in *Fullerton v. City of Schenectady*,⁹⁵ where the plaintiff sued the City of Schenectady for injuries sustained when he fell on a defective sidewalk.⁹⁶ The city invoked the prior written notice statute as a defense, asserting that it had not received notice of the defect prior to the injury.⁹⁷ The

86. 187 N.Y. 37, 79 N.E. 863 (1907).

87. *Id.* at 39, 79 N.E. at 863.

88. *Id.* at 48, 79 N.E. at 866. The court reasoned that because the municipality was covered by the state's sovereign power, "it is for the legislature to prescribe whether, and how far, for the breach of a public duty, the individual may maintain a civil action to remedy an injury occasioned thereby." *Id.* at 43, 79 N.E. at 865.

89. *Id.* at 41, 79 N.E. at 864.

90. *Id.*

91. 251 A.D. 607, 297 N.Y.S. 736 (3d Dep't 1937) (action against city to recover for injuries caused by protruding valve in sidewalk where city had not received prior written notice of defect).

92. *Id.* at 611, 297 N.Y.S. at 740.

93. N.Y. SECOND CLASS CITIES LAW § 244 (McKinney Supp. 1980-81). See note 74 *supra*.

94. 251 A.D. at 611, 297 N.Y.S. at 740.

95. 285 A.D. 545, 138 N.Y.S.2d 916 (3d Dep't 1955), *aff'd*, 309 N.Y. 701 (1955), *appeal dismissed*, 350 U.S. 980 (1956).

96. *Id.* at 546, 138 N.Y.S.2d at 917.

97. *Id.* at 546, 138 N.Y.S.2d at 918.

appellate division held that Schenectady's prior notice law was constitutional.⁹⁸ The *Fullerton* court pointed out that the court in *Hayward* had overlooked the Second Class Cities Law provision which states that the law applies "until such provision is superceded pursuant to the City Home Rule Law"⁹⁹ The City Home Rule Law at the time¹⁰⁰ followed the language of the New York State Constitution,¹⁰¹ which provided that a city shall have the power to adopt and amend local laws which are not inconsistent with the constitution and laws of the state relating to the "care, management and use of its streets and property."¹⁰² The *Fullerton* court determined that a prior notice statute related to the care and management of a city's streets¹⁰³ and because a city has the power to determine the type of notice it may require as a condition precedent to liability,¹⁰⁴ the Schenectady prior written notice law was held to be constitutional.¹⁰⁵

Another argument for declaring the pothole law unconstitutional is that it violates the equal protection clause of the United States Constitution¹⁰⁶ by arbitrarily dividing all tortfeasors into two classes: private tortfeasors to whom no prior notice of defect is owed and municipal tortfeasors to whom prior notice is owed.¹⁰⁷ The law similarly divides

98. *Id.* at 547, 138 N.Y.S.2d at 919.

99. *Id.* at 546-47, 138 N.Y.S.2d at 918, quoting from N.Y. SECOND CLASS CITIES LAW § 4 (McKinney 1952) (present version at McKinney Supp. 1980-81). See note 74 *supra*.

100. The City Home Rule in 1937 stated in relevant part: "the local legislative body of a city shall have power to adopt and amend local laws in relation to . . . the acquisition, care, management and use of its streets and property. . . ." Ch. 670, § 1, 1928 N.Y. Laws 1446 (current version at N.Y. MUN. HOME RULE LAW § 11 (McKinney 1969)).

101. N.Y. CONST. art. IX, § 2(c)(6). See note 69 *supra* and accompanying text.

102. *Id.*

103. 285 A.D. at 547, 138 N.Y.S.2d at 919.

104. *Id.*

105. *Id.* at 548, 138 N.Y.S.2d at 919. New York courts have upheld prior written notice statutes in other cases. *Zidel v. Village of Freeport*, 63 A.D.2d 672, 404 N.Y.S.2d 678 (2d Dep't 1978); *Drzewiecki v. City of Buffalo*, 51 A.D.2d 870 (4th Dep't 1976); *Weingarten v. City of Long Beach*, 154 N.Y.S.2d 101 (Long Beach City Ct. Nassau County 1956). *But see Zumbo v. Town of Farmington*, 60 A.D.2d 350, 401 N.Y.S.2d 121 (4th Dep't 1978); *Klimek v. Town of Ghent*, 98 Misc. 2d 893, 414 N.Y.S.2d 662 (Sup. Ct. Columbia County 1979), where local laws were declared unconstitutional because they were inconsistent with § 50-e of the New York General Municipal Law.

106. The equal protection clause of the United States Constitution provides, in relevant part, that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. See note 110 *infra*.

107. Critics and judges have argued that the Pothole Law also discriminates against the poor, the uneducated and minorities. N.Y. County Lawyers Ass'n, Maj. Report on New York City Council Bill Interim No. 687 1 (Oct. 29, 1979). See Hunter

the claimants into two classes: those who must meet the notice requirements and those who are not subject to them. In cases involving notice of claim statutes,¹⁰⁸ several state courts¹⁰⁹ have found that the creation of such classes does not bear a rational relationship¹¹⁰ to the purposes underlying the statutes.¹¹¹ Therefore, they have been held to be a violation of the equal protection clause of the federal constitution.¹¹²

v. North Mason High School, 85 Wash. 2d 810, 813, 539 P.2d 845, 848 (1975) (notice of claim statutes are discriminatory because only the well educated tort victim will be able to understand the notice requirements). Furthermore, it is argued by Abraham Fuchsberg, a negligence attorney, that the streets and sidewalks are in worse condition in poverty areas so that the poor and minorities are more likely to be affected by the law than other groups. Fuchsberg, *Justice Falls Down These Mean Streets*, 13 TRIAL LAW. Q. 45, 49-50 (1980). This determination comes from a study done of actual cases in Mr. Fuchsberg's office. *Id.* at 48. The city performed a study which showed, to the contrary, that less than two percent of the sidewalk and roadway claims emanate from primary poverty areas. *See also* Reich v. State Highway Dept., 386 Mich. 617, 194 N.W.2d 700 (1972); Turner v. Staggs, 89 Nev. 230, 510 P.2d 879 (1973), *cert. denied*, 404 U.S. 1079; Hunter v. North Mason High School, 85 Wash. 2d 810, 539 P.2d 845 (1975).

108. Notice of claim statutes generally provide that as a condition precedent to bringing an action against a municipality, a claimant must file notice of his claim with the city within a designated amount of time after the claim arises. *See, e.g.*, MICH. COMP. LAWS ANN. § 691.1404 (Supp. 1981); NEV. REV. STAT. §§ 244.245-250 (1979).

109. *See* note 111 *infra*. The New York notice of claim statute, N.Y. GEN. MUN. LAW § 50-e (McKinney 1977), has been upheld by the appellate division as not violative of the equal protection clause of the state and federal Constitutions. *Guarrera v. A.L. Lee Memorial Hosp.*, 51 A.D.2d 867, 867, 380 N.Y.S.2d 161, 162 (4th Dep't 1976). *See also* Pausley v. Chaloner, 54 A.D.2d 131, 133, 388 N.Y.S.2d 35, 37 (3d Dep't 1976).

110. The rational basis test was set forth in *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). The Court held that a state does not violate the equal protection clause if the classification made by the law has a reasonable basis. *Id.* The rational basis test evolved because the Court recognized that states must often classify their citizens in order to function properly. *Id.* A classification is not violative of the Constitution because "it is not made with mathematical nicety or because in practice it results in some inequality." *Id.* In *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), the state's interest in maintaining the city's appearance in its French Quarter constituted a rational basis for sustaining a regulation banning certain street vendors. *Id.* at 304-05. In *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the Supreme Court sustained a regulation restricting land use to one family dwellings because the state's interest in preserving residential neighborhoods was rational. *Id.* at 7-8. *See Carmichael v. Southern Coal Co.*, 301 U.S. 495, 509-10 (1937); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077-81 (1969); *Notice of Claim Provisions: An Equal Protection Perspective*, 60 CORNELL L. REV. 417, 436-37 (1975). *See generally* Note, *Inmate Abortions—The Right to Government Funding Behind the Prison Gates*, 48 FORDHAM L. REV. 550, 565-66 (1980).

111. *Reich v. State Highway Dep't*, 386 Mich. 617, 623, 194 N.W.2d 700, 702 (1972); *Turner v. Staggs*, 89 Nev. 230, 510 P.2d 879 (1973), *cert. denied*, 414 U.S. 1079 (1973); *Hunter v. North Mason High School*, 85 Wash. 2d 810, 539 P.2d 845 (1975).

112: *Id.* *See* notes 116, 120 *infra*.

For example, in *Turner v. Staggs*,¹¹³ an action was brought on behalf of minor children against the administrator of a county hospital for the wrongful death of their mother.¹¹⁴ The claim was not filed until thirteen months after the mother's death.¹¹⁵ The Nevada notice of claim statute required that a claim against a county had to be filed within six months from the date the cause of action arose.¹¹⁶ The Nevada Supreme Court held that the statute violated the equal protection clause of both the Nevada and the United States constitutions because "failure to give the 6 month statutory notice arbitrarily bars the victims of governmental tort while the victims of private tort suffer no such bar."¹¹⁷

As the Washington Supreme Court pointed out in *Hunter v. North Mason High School*,¹¹⁸ the major consideration in enacting a notice of claim statute is to protect the government from liability for its own wrongdoing.¹¹⁹ By waiving the sovereign immunity of the state and its political subdivisions,¹²⁰ the government places itself in a position equal to that of private persons and corporations.¹²¹ Therefore, the court reasoned that the state and its subdivisions forfeited the right to a special status separate from that of individuals.¹²² In addition, the court held that protection of the public treasury is not a valid purpose on which to uphold notice of claim statutes.¹²³ Consequently, there was no justification for discriminating between victims of governmental torts and victims of private torts.¹²⁴

113. 89 Nev. 230, 510 P.2d 879 (1973).

114. *Id.* at 231, 510 P.2d at 880.

115. *Id.*

116. NEV. REV. STAT. §§ 244.245, 244.250 (1979).

117. 89 Nev. at 235, 510 P.2d at 883.

118. 85 Wash. 2d 810, 539 P.2d 845 (1975) (action brought against school district for injury sustained by student during gym class failed to comply with 120 day statutory notice of claim requirement).

119. *Id.* at 818-19, 539 P.2d at 850.

120. 1963 Wash. Laws ch. 159, § 2. In New York State the waiver of sovereign immunity is not at issue because street repair is a proprietary function. *See* notes 80-82 *supra*.

121. 85 Wash. 2d at 818, 539 P.2d at 850. "Our state has clearly and unequivocally abjured any desire to so insulate itself from liability, however, in its absolute waiver of sovereign immunity, which places the government on an equal footing with private parties defendant." *Id.* *See* note 111 *supra*.

122. *Id.*

123. *Id.* *See* notes 125-128 *infra* and accompanying text.

124. *Id.* Note, *Notice of Claim Provisions: An Equal Protection Perspective*, 60 CORNELL L. REV. 417, 440-45 (1975). The author argues that notice of claim statutes should be struck down as irrational because they fall short of meeting their goals. Alternatively, if the statute achieves those ends, it does so at too great a cost to victims of governmental torts. *Id.* at 440-41. This analysis involves a determination of whether less drastic means of achieving those same goals are available. *Id.* at 442.

Other courts, in striking down the doctrine of sovereign immunity, have held that a city's financial problems do not justify shielding it from liability.¹²⁵ Payment of damage claims by a city for its negligence is not a proper purpose.¹²⁶ In addition, the issue of the municipality's ability to pay such damages is not relevant to a determination of whether the law is fair and equitable.¹²⁷ "Anything short of financial disaster, . . . is insufficient reason for exempting the cities from the rule of tort liability."¹²⁸

Prior written notice of defect statutes, like notice of claim statutes, involve complex notice requirements and are enacted to save money by shielding the municipality from liability for its own negligence. Therefore, the same equal protection argument can be applied to strike down the Pothole Law, unless a court finds that it is a rational means of achieving those goals.

The New York notice of claim statute has been upheld by the judiciary. The appellate division in *Pausley v. Chaloner*,¹²⁹ upheld the statute on the basis of the state's sovereign immunity.¹³⁰ *Pausley* involved a minor child's suit against a county hospital for negligent treatment. The court stated that the operation of a hospital is a governmental function.¹³¹ Formerly, a municipal corporation was insulated from liability for negligent performance of government functions pursuant to the doctrine of sovereign immunity. In limiting liability the court reasoned that although the legislature had waived the state's sovereign immunity, it nevertheless retained the power to

125. *Parish v. Pitts*, 244 Ark. 1239, 1252, 429 S.W.2d 45, 51 (1968) (in an action for injuries sustained as a result of city employee's negligence, the rule shielding a municipality from liability for negligent acts of its employees was patently unjust and was overturned); *Ayala v. Philadelphia Bd. of Pub. Educ.*, 453 Pa. 584, 596, 305 A.2d 877, 883 (the court abolished the doctrine of sovereign immunity in an action against Board of Education for injuries sustained by student). See also Leflar and Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. L. REV. 1363 (1954); Note, *The Discretionary Exception and Municipal Tort Liability: A Reappraisal*, 52 MINN. L. REV. 1047 (1968).

126. 453 Pa. at 596, 305 A.2d at 883.

127. *Id.* at 597, 305 A.2d at 883, quoting from *Flagiello v. Pennsylvania Hosp.*, 417 Pa. 486, 503-04, 208 A.2d 193, 202 (1965).

128. 244 Ark. at 1249, 429 S.W.2d at 50. Cf. *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 216, 359 P.2d 457, 460, 11 Cal. Rptr. 89, 92 (1961) (the doctrine of governmental immunity is "without rational basis").

129. 54 A.D.2d 131, 388 N.Y.S.2d 35 (3d Dep't 1976), appeal dismissed, 41 N.Y.2d 900 (1977). See also Note, *Notice of Claim Provisions: An Equal Protection Perspective*, 60 CORNELL L. REV. 417, 431 (1975) (constitutionality of notice of claim provisions discussed on due process and equal protection grounds).

130. 54 A.D.2d at 133, 388 N.Y.S.2d at 37.

131. *Id.* See notes 9-16 *supra* and accompanying text.

condition the right to bring suit.¹³² This holding cannot be applied to the Pothole Law, however, because the city's duty to repair defects in streets and sidewalks always has been considered a proprietary function.¹³³

The New York notice of claim statute is considered valid because the classifications it creates have a rational basis.¹³⁴ The appellate division has observed that the purpose of the statute was "to assure the city an adequate opportunity to investigate the circumstances surrounding the accident and to explore the merits of the claim while information is still readily available."¹³⁵ This purpose was deemed to be valid and was held to provide a rational basis for the difference in treatment accorded municipal and private negligence victims.¹³⁶ The New York City prior written notice statute, however, does not have a valid purpose. Rather, its purpose mirrors that of the notice of claim statutes held unconstitutional in other states—to insulate New York City from liability and thereby reduce the amount of money paid out in sidewalk and roadway claims. Therefore, the discrimination between victims of municipal negligence and private negligence engendered by the Pothole Law has no rational basis.¹³⁷

132. 54 A.D.2d at 133, 388 N.Y.S.2d at 37, *citing* *Matter of Brown v. Board of Trustees*, 303 N.Y. 484, 489, 104 N.E.2d 866, 868-69 (1952).

133. *See* note 80 *supra* and accompanying text.

134. *Guarerra v. A.L. Lee Memorial Hosp.*, 51 A.D.2d 867, 867, 380 N.Y.S.2d 161, 162 (4th Dep't 1976) (plaintiff, in malpractice action against municipal hospital, failed to meet the notice of claim requirements of the New York General Municipal Law § 50-e).

135. *Id.* at 867, 380 N.Y.S.2d at 162, *quoting* *Teresta v. City of New York*, 304 N.Y. 440, 443, 108 N.E.2d 397, 398 (1952).

136. *Id.* In *Zipser v. Pound*, 69 Misc. 2d 152, 329 N.Y.S.2d 494 (White Plains City Ct.), *rev'd*, 79 Misc. 2d 489, 348 N.Y.S.2d 18 (Sup. Ct. Westchester County 1972), the trial court held that the New York notice of claim statute violated the due process and equal protection provisions of the United States Constitution because the statute created two classes of plaintiffs. The appellate court, however, reversed the lower court's holding that discrimination between plaintiffs on the basis of the tortfeasor's identity violated the Constitution's guarantee of equal protection of the laws.

137. Another constitutional argument advanced is that the Pothole Law violates the due process clause of the New York State Constitution. N.Y. County Lawyers Ass'n, Maj. Report on City Council Bill Interim No. 687 3 (Oct. 29, 1979). This argument was used in other jurisdictions where prior notice laws were declared void. In *City of Tulsa v. Wells*, 79 Okl. 39, 191 P. 186 (1920), plaintiff was injured when thrown from his bicycle after contact with uneven pavement and subsequently brought an action against the city for failure to maintain the pavement in a reasonably safe condition. *Id.* at 40, 191 P. at 187. The City of Tulsa argued that plaintiff failed to meet the prior written notice requirement set forth in the city charter. *Id.* at 47, 191 P. at 194. The Oklahoma Supreme Court, however, declared the prior written notice requirement unconstitutional because it placed a nearly impossible burden upon a litigant by requiring that he inform the mayor that he expected to be

The Pothole Law has been criticized as a procedural device to re-enact the doctrine of sovereign immunity.¹³⁸ The New York State legislature, recognizing the unfairness of the doctrine, waived the sovereign immunity of the state and its political subdivisions when the Court of Claims Act was passed.¹³⁹ In fact, courts throughout the United States reject the doctrine¹⁴⁰ because it places too great a burden on tort victims who are left without a remedy while the financial burden easily can be "spread by taxes among the public receiving the

injured or that someone else inform the mayor of the defect at least twenty-four hours before the accident. *Id.* at 48-49, 191 P. at 195. Such a requirement "so far depart[s] from reasonableness as to amount to a denial of justice, and is therefore void." *Id.* at 49, 191 P. at 196. Prior written notice "provision of the charter, upon its face, is unreasonable, and . . . to hold it good would be to couple a remedy with a frequently impossible condition." *Id.*, quoting *Born v. City of Spokane*, 27 Wash. 719, ___, 68 P. 386, 89 (1902). *Hanks v. City of Port Arthur*, 121 Tex. 202, ___, 48 S.W.2d 944, 947 (1932) (the requirement of notice was determined to be an "unreasonable abridgement of the right to obtain redress for injuries, and [therefore] amounted to a denial of due process.").

Wells, Born and Hanks based their holdings on state constitutional provisions which granted every citizen the right to a remedy for an injury sustained. *See e.g.*, TEXAS CONST. art. I, § 13 (1955). Because such a provision does not exist in the New York State Constitution, restricting a person's right to recover by creating procedural requirements as a condition precedent to recovery does not violate the state constitution. The due process arguments against the Pothole Law are invalid.

138. *See* note 67 *supra*.

139. N.Y. CT. CL. ACT § 8 (McKinney 1963) provides:

The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article. . . .

Id. *See* note 71 *supra*. The state waived its sovereign immunity generally because of "the widespread dissatisfaction and injustice of turning out of court, remediless, citizens who had been injured by negligence on the part of agents of the state." *Williams v. City of New York*, 57 N.Y.S.2d 39, 40 (Sup. Ct. N.Y. County 1945) (action brought against firemen for negligent maintenance of firehouse). Another purpose of the Court of Claims Act was "to obviate the need for frequent special legislative acts to redress wrongs and to make whole those damaged by the State through Court machinery established for that purpose by the Legislature." *Corcoran v. New York*, 56 Misc. 2d 293, 298, 288 N.Y.S.2d 801, 806 (Ct. Cl.), *rev'd on other grounds*, 30 A.D.2d 991, 294 N.Y.S.2d 171 (3d Dep't 1968), *aff'd*, 24 N.Y.2d 922, 249 N.E.2d 764, 301 N.Y.S.2d 985 (1969).

140. *City of Phoenix v. Williams*, 89 Ariz. 299, 361 P.2d 651 (1961); *Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968); *Woods v. City of Palatka*, 63 So. 2d 636 (Fla. 1953); *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960); *Haney v. City of Lexington*, 386 S.W.2d 738 (Ct. App. Kentucky 1964); *Happy v. Erwin*, 330 S.W.2d 412 (Ct. App. Kentucky 1959); *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975); *Ayala v. Philadelphia Bd. of Public Educ.*, 453 Pa. 584, 305 A.2d 877 (1973); *Lebohm v. City of Galveston*, 154 Tex. 192, 275 S.W.2d 951 (1955).

benefits."¹⁴¹ The Pothole Law in its attempt to limit liability by creating harsh procedural requirements, effectively shields the city from liability and revives the doctrine of sovereign immunity. The court in *Fullerton v. City of Schenectady*,¹⁴² while holding that a prior written notice statute was valid, noted that the statute's purpose undermined the waiver of sovereign immunity.¹⁴³

A third legal argument against the Pothole Law is that it abrogates the traditional concepts of common law negligence that govern municipal liability. For instance, common law held the city liable for injuries caused by dangerous conditions in the streets and sidewalks if it had actual or constructive notice.¹⁴⁴ If the injured party knew of the defect, the doctrine of comparative negligence reduced recovery in proportion to the extent that the victim's negligence contributed to the injury.¹⁴⁵ The Pothole Law, however, eliminates the doctrine of constructive notice and may bar recovery even if an injured party had no knowledge of the defect.

Pursuant to the Pothole Law, New York City is liable only for injuries caused by defects of which it had actual prior written notice. This removes the city's incentive to inspect and maintain the streets in reasonably safe condition for the public. For example, if the city knew about a particular pothole because it was located immediately in front of City Hall and had been there for several years, liability still could not be incurred if written notice had not been submitted prior to an injury.

141. *Parish v. Pitts*, 244 Ark. at 1247, 429 S.W.2d at 49.

142. 285 A.D. 545, 138 N.Y.S.2d 916 (3d Dep't 1955), *aff'd*, 309 N.Y. 701, 95 N.E.2d 48 (1955) *appeal dismissed*, 350 U.S. 980 (1956).

143. 285 A.D. at 548, 138 N.Y.S.2d at 919-20. The court stated it readily agreed "that local laws of the character involved here are in reality attempts to bar tort actions under the guise of a procedural requirement, and that they put upon many deserving litigants an impossible burden." *Id.*

144. *See* note 7 *supra*.

145. N.Y. CIV. PRAC. § 1411 (McKinney 1976). The statute provides:

In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.

Id. *See also* *Copart Indus., Inc. v. Consolidated Edison Co.*, 41 N.Y.2d 564, 362 N.E.2d 968, 394 N.Y.S.2d 169 (1977); *Long v. Zientowski*, 73 Misc. 2d 719, 340 N.Y.S.2d 652 (Dunkirk City Ct. Chautauqua County 1973); *Homburger, The 1975 New York Judicial Conference Package: Class Actions and Comparative Negligence*, 25 BUFFALO L. REV. 415, 430-38 (1975); *Krause, Comparative Negligence in New York*, 47 N.Y.S.B.A.J. 638 (1975).

The Pothole Law places an affirmative obligation to report defects on the public because in the absence of such a report, recovery is denied. Thus, even though an individual reports one pothole, that person may still be barred from recovering for injuries caused by another street defect. Recovery would be denied because other citizens failed to report the second defect. The common law concept of comparative negligence, consequently, is turned upside down and the victim is penalized due to the city's lack of prior knowledge of the defect. Furthermore, the city's liability is no longer predicated upon whether an individual has complied with the procedural steps imposed by the statute.

The debate surrounding the enactment of the Pothole Law involves important policy considerations. Opponents of the law, including special interest groups such as the New York State Trial Lawyers Association, the Automobile Club of New York, negligence lawyers, and citizens contend that the legislature's reasons¹⁴⁶ for enactment do not justify the procedural inequities it creates. The Pothole Law places an undue burden on the individual tort victim by requiring compliance with complex notice requirements.¹⁴⁷ In addition, injured victims suffer financial hardship if they are denied recovery because prior written notice had not been submitted, while the burden of paying for such damages could be borne more easily by an entire community.¹⁴⁸ Since the city performs activities capable of causing

146. As stated in Section Three of this Note, the city had four major reasons for enacting the prior written notice statute: to achieve conformity with other cities in New York State; to reduce the amount of money paid out in sidewalk and roadway claims; to eliminate fraudulent claims; and to encourage the city to make repairs. See notes 38-41 *supra* and accompanying text.

147. Even those persons who are literate and civic minded enough to comply with the requirements of the statute cannot be expected to write letters every time they discover defects in the city's sidewalks and streets. N.Y. Times, Nov. 15, 1979, § 1, at 30, col. 5 (letter to the editor by Abraham Fuchsberg). Mr. Fuchsberg asked whether the "less fortunate, less literate, less able to speak or write, our aged and our blind . . ." can be expected to write such letters? *Id.* Furthermore, it is precisely these less fortunate, such as senior citizens, who are most often the victims of defective sidewalk injuries. Fuchsberg, *Justice Falls Down These Mean Streets*, 13 TRIAL LAW. Q. 45, 48 (1980). See also *City of Tulsa v. Wells*, 79 Okla. 39, 48-49, 191 P. 186, 195 (1920); *Hanks v. City of Port Arthur*, 121 Tex. 202, 48 S.W.2d 944, 947 (Tex. 1932). N.Y. County Lawyers Ass'n, Maj. Report on City Council Bill Interim No. 687 1 (Oct. 29, 1979). The report states that many people cannot fill out forms or speak English, no less write a cogent letter describing a defect. *Id.* Cf. 85 Wash. 2d at 814, 539 P.2d at 848. For a detailed description of the notice procedures involved, see notes 56-57 *supra* and accompanying text.

148. See *Parish v. Pitts*, 244 Ark. 1239, 1247, 429 S.W.2d 45, 49 (1968); *Barker v. City of Santa Fe*, 47 N.M. 85, 85, 136 P.2d 480, 482 (1943); *Ayala v. Philadelphia*

injuries, the injuries those activities cause should be viewed as “part of the normal and proper costs of public administration and not as a diversion of public funds.”¹⁴⁹ Otherwise, the injured victim of the city’s negligence has no legal remedy. Finally, the Pothole Law invites litigation because some of its provisions are vague. Nowhere in the statute is proper notice defined; instead this issue is left to the courts for interpretation.¹⁵⁰ The city has argued that the statute would eliminate fraudulent claims. Such claims do not disappear with the enactment of a prior written notice statute, however, because it is a simple matter to create a defect, report it, and then arrange for an accident to occur.¹⁵¹ Furthermore, reduction of fraudulent claims is not a policy reason which justifies the enactment of a statute.¹⁵²

Few, if any, cities in the United States outside New York State have prior written notice of defect statutes.¹⁵³ There are three types of statutes in other states, however, which establish a city’s duty to maintain streets and which impose liability with respect to claims arising out of failure to repair defective streets. First, some statutes impose an affirmative duty on a municipality to keep its streets and sidewalks in reasonably safe condition and free from nuisances.¹⁵⁴

Bd. of Public Educ., 453 Pa. 584, 593, 305 A.2d 877, 881, *quoting* *Barker v. City of Santa Fe*, 47 N.M. 85, 85, 136 P.2d 480, 482.

149. *Ayala v. Philadelphia Bd. of Public Educ.*, 453 Pa. 584, 594, 305 A.2d 877, 882, *quoting* *Comments on Recent Important Tort Cases*, 32 AM. TRIAL LAW. J. 284, 288 (1968).

150. N.Y. County Lawyers Ass’n, Maj. Report on City Council Bill Interim No. 687 3 (Oct. 29, 1979). *See* notes 55-64 *supra* and accompanying text.

151. N.Y. County Lawyers Ass’n, Maj. Report on City Council Bill Interim No. 687 3 (Oct. 29, 1979).

152. The Report stated that elimination of fraudulent claims would not be “an acceptable tradeoff for the equally expected denial of many legitimate claims which would be prevented.” *Id.* at 3. The New York State Court of Appeals also has addressed this issue.

Although fraud, extra litigation and a measure of speculation are, of course, possibilities, it is no reason for a court to eschew a measure of its jurisdiction. “The argument from mere expediency cannot commend itself to a Court of justice, resulting in the denial of a logical legal right and remedy in *all* cases because in *some* fictitious injury may be urged as a real one.”

Battalla v. State, 10 N.Y.2d 237, 240-41, 219 N.Y.S.2d 34, 37 (1961), *quoting* *Green v. T.A. Shoemaker & Co.*, 111 Md. 69, 81, 73 A. 688, 692 (1909) (emphasis added by N.Y. Court of Appeals).

153. *See, e.g., Pomeroy v. City of Independence*, 209 Or. 587, 307 P.2d 760 (1957) (city charter provision that immunized city from liability in absence of prior written notice of defect causing injury held valid).

154. IDAHO CODE ANN. § 50-313 (1980); IOWA CODE ANN. § 364.12 (West 1976); MICH. COMP. LAWS § 102.1 (1967); OHIO REV. CODE ANN. § 723.01 (Page 1976).

For example, an Ohio statute establishes a municipality's powers and duties with respect to street maintenance. The statute provides that a municipal corporation "shall have the care, supervision, and control of public highways, streets, . . . sidewalks, . . . and viaducts within the municipal corporation, and shall cause them to be kept open, in repair, and free from nuisance."¹⁵⁵ Second, a city's liability may be determined according to whether it received actual or constructive notice of a defect.¹⁵⁶ In Georgia, for instance, a municipality is insulated from liability resulting from defects in public streets "when it has not been negligent in constructing or maintaining the same or when it has no actual notice thereof, or when such defect has not existed for a sufficient length of time for notice thereof to be inferred."¹⁵⁷ Third, some states limit a city's liability to cases where only actual notice of the defect was received prior to the injury.¹⁵⁸ In Maine, for example, the state statute provides that in order for a municipality to be liable for injuries due to street defects, the municipal officers must have "had 24 hours actual notice of the defect or want of repair,"¹⁵⁹ Until recently, Nebraska was the only state which had a prior written notice of defect statute.¹⁶⁰ In 1970, however, the statute was repealed and the common law doctrine of actual or constructive notice was reinstated.¹⁶¹

Thus, while some states hold a municipality liable for failure to maintain its streets in reasonably safe repair when the city has actual

155. OHIO REV. CODE ANN. § 723.01 (Page 1976). See, e.g., *Cleveland v. Amato*, 123 Ohio St. 575, 176 N.E. 227 (1931).

156. GA. CODE § 95A-505 (1976); MICH. COMP. LAWS § 691.1403 (West 1968); 1959 MINN. LAWS ch. 663.

157. GA. CODE § 95A-505 (1976). *City of Atlanta v. Williams*, 119 Ga. App. 353, 166 S.E.2d 896 (1969).

158. ME. REV. STAT. ANN. tit. 23, § 3655 (Supp. 1981-82).

159. *Id.* In some states, actual notice does not have to be in writing. In Montana, for example, a telephone call to an unidentified employee of a city official was held to constitute actual notice. *Ratliff v. City of Great Falls*, 132 Mont. 89, ____, 314 P.2d 880, 883 (1957) (action against municipality for injuries sustained from fall on defective sidewalk; city deemed to have actual notice of defect). The Montana notice of defect statute, MONT. REV. CODE ANN. § 11-1305 (1968), has since been repealed. 1977 Mont. Laws ch. 234, § 9.

160. NEBRASKA REV. STAT. § 14-802 (1977). See also Durst, *Prior Written Notice for Municipal Liability*, 13 TRIAL LAW. Q. 52, 56 (1980).

161. 1969 Neb. Laws ch. 138, § 28. See also *Mackey v. Midwest Supply Co.*, 186 Neb. 834, 186 N.W.2d 916 (1971). It appears that the statute may have been repealed in order to facilitate an individual's ability to successfully bring suit. The repealing statute states:

The Legislature . . . declares that it is its intent and purpose through this enactment to provide uniform procedures for the bringing of tort claims

or constructive notice of a particular defect or dangerous condition, other states opt for the more stringent requirement of actual notice. There are no states other than New York, however, which require written notice of the defect before the injury occurs.

IV. Conclusion

The City of New York enacted its prior written notice statute as a procedural device to save money.¹⁶² Although the budgetary problems the city experienced necessitated a change in common law principles of municipal liability,¹⁶³ it is questionable whether the statute limits liability in the most effective or equitable manner. The Pothole Law should be revised so that liability is imposed when the city has received actual or constructive notice. Constructive notice should be presumed after a specific period of time has elapsed. This was the approach taken by the Michigan legislature with respect to the repair of highways.

No governmental agency is liable for injuries or damages caused by defective highways unless the governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place. Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place.¹⁶⁴

A law patterned after the Michigan model would give the city ample time before it is deemed to have notice and sufficient time in which to repair the defect. It also would provide an incentive to inspect the streets for defects and make repairs because failure to do so would result in liability. Finally, it would enable an injured person with a valid claim to recover damages in almost all cases when the city is negligent.¹⁶⁵

against all political subdivisions, whether engaging in governmental or proprietary functions, and that the procedures provided by this act shall be used to the exclusion of all others.

1969 Neb. Laws ch. 138, § 1.

162. See note 34 *supra*.

163. See notes 153-161 *supra* and accompanying text.

164. MICH. COMP. LAWS § 691.1403 (1968). See, e.g., *Sable v. City of Detroit*, 1 Mich. App. 87, ___, 134 N.W.2d 375 (1965).

165. Rather than specifying 30 days for the presumption of notice to arise and time to effect repairs, it might be more equitable to allow the presumption to arise after a reasonable time has passed, taking into account the nature and location of a defect. For example, the city should be given less time to repair a five inch hole in a

In addition to statutory measures, it is necessary to set up an efficient system of reporting defects. A satisfactory system of reporting defects would provide an adequate amount of time to make repairs and not impose complex procedures with which the average citizen cannot comply. Citizens do not have the resources or the organization to submit reports¹⁶⁶ nor is the city's current system of five inspectors per borough adequate.¹⁶⁷ If the duty to inspect the streets were shifted to employees of the Department of Sanitation, for instance, the city would be able to improve reporting efficiency without unreasonable increases in cost.¹⁶⁸

The combination of a new statute and a new system of reporting defects would accomplish the city's purposes of reducing claims and improving efficiency in undertaking repairs, and do so in a manner which does not violate the common law right of tort victims to recover for injuries sustained as a result of another's wrong.

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major intersection than to repair the erosion of two lanes of a major highway. Similarly, constructive notice should be imputed to the city after a long period of time in the case of a small defect in a relatively untravelled area, whereas only fifteen days might be enough time to impute notice to the city for a two foot hole in front of City Hall. *See generally* *Town of Monticello v. Kenard*, 7 Ind. App. 135, 34 N.E. 454 (1893) (eight foot wide obstruction gave rise to notice in a three day period); *City of Dayton v. Thompson*, 372 S.W.2d 407 (Ky. Ct. App. 1963) (a hole 3 feet deep gave rise to notice after several days); *Dahl v. Nelson*, 79 N.D. 400, 56 N.W.2d 757 (1953) (one day was not enough time to give rise to constructive notice of ruts around manhole cover).

166. *See* note 25 *supra*.

167. *Sidewalk and Roadway Analysis*, *supra* note 2, at 14.

168. The sanitation crews which cover the city's streets several times a week could, with a minimum of additional money, men, or time, keep a record of the defects and submit it at the end of each day. The city would then file these records in a manner similar to the system presently utilized and undertake repairs accordingly. It is likely that unions representing the sanitation workers would balk at such an additional responsibility without an increase in pay. Hence, this is an additional subject for the city and the unions to discuss in negotiations. Despite the immediate increased costs to the city, such a program would save money in the long-run because the amount paid out in claims would substantially decrease.

